

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

NESTOR FLORES,

Defendant and Appellant.

B213693

(Los Angeles County
Super. Ct. No. GA061629)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Dorothy L. Shubin, Judge. Affirmed.

Alan Mason, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James
William Bilderback II, Supervising Deputy Attorney General, Sonya Roth, Deputy
Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Nestor Flores (defendant) of one felony count of making criminal threats and one misdemeanor count of vandalism. On appeal, defendant claims ineffective assistance of counsel based upon his trial counsel's failure to object to the trial court's imposition of the upper term sentence on the criminal threats conviction. According to defendant, the trial court cited only one factor in aggravation to justify the upper term, and that factor was improper under California Rules of Court, rule 4.420(d) because it was an element of the criminal threats count.

We hold that because the trial court cited and relied upon two additional factors in aggravation, either one of which justified the imposition of the upper term sentence, defendant cannot show prejudice from his counsel's failure to object to the challenged factor. We therefore confirm the judgment of conviction and sentence.

PROCEDURAL BACKGROUND

In a four-count amended information, the Los Angeles County District Attorney charged defendant in count 1 with criminal threats in violation of Penal Code section 422¹—a felony; in count 2 with possession of a firearm by a felon in violation of section 12021, subdivision (a)(1)—a felony; in count 3 with possession of ammunition in violation of section 12316, subdivision (b)(1)—a felony; and in count 4 with vandalism in violation of section 594, subdivision (a)—a misdemeanor. The District Attorney alleged as to count 1 that defendant suffered a prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1). The District Attorney further alleged as to counts 1, 2, and 3 that defendant had suffered three prior felony convictions within the meaning of section 1203, subdivision (e)(4). And the District Attorney alleged as to

¹ All further statutory references are to the Penal Code unless otherwise indicated.

counts 1, 2, and 3 that defendant had suffered four prior strike convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i).

Defendant pleaded not guilty and denied the special allegations. Following trial, the jury found defendant guilty on counts 1 and 4, but acquitted him on counts 2 and 3. Defendant admitted the four prior strike allegations and, pursuant to defendant's *Romero*² motion, the trial court struck three of defendant's four prior strike convictions. The trial court denied probation and sentenced defendant to 11 years in state prison, comprised of an upper term sentence of three years on count 1, doubled pursuant to defendant's prior strike conviction, plus an additional five years pursuant to section 667, subdivision (a)(1). The trial court also sentenced defendant on count 4 to a concurrent 365-day sentence in county jail.

DISCUSSION

Defendant does not raise any challenge to his conviction on counts 1 and 4, but instead challenges the trial court's imposition of the upper term sentence on count 1. According to defendant, the trial court relied on only one factor—i.e., that the crime of which he was convicted involved a threat of great bodily injury—and that factor was improper under California Rules of Court, rule 4.420(d)³ because it was one of the elements of the charged crime of criminal threats in violation of section 422.⁴ Because

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ Rule 4.420(d) provides: "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term."

⁴ Section 422 provides in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of

his counsel did not object to the imposition of the upper term on count 1 on this basis, defendant contends he received ineffective assistance of counsel warranting reversal.

To show ineffective assistance of counsel, defendant would have to show “not only that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, but also would have to show prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 104 S.Ct. 2052].)” (*People v. Johnson* (2009) 47 Cal.4th 668, 683.) But defendant cannot demonstrate prejudice in this case because, contrary to his assertion, the trial court relied on *two* additional factors in imposing the upper term sentence.

At the sentencing hearing, the trial court stated the following concerning the imposition of the upper term sentence on count 1. “And in terms of the high term, I am considering circumstances in aggravation under the Rules of Court, that the crime did involve a threat of great bodily harm. I am going to run count 4 concurrent, so the defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed. And also that he has served a prior prison term.” Based on the record, it appears that the trial court was relying not upon one, but upon three factors in imposing the upper term sentence: (i) the crime involved the threat of great bodily harm; (ii) defendant was convicted of another crime, vandalism, for which consecutive sentences could have been imposed but were not; and (iii) defendant had served a prior prison term.”

California Rules of Court, rule 4.421(a)(7) provides that one of the factors relating to the crime which can be considered as a circumstance in aggravation is that “[t]he defendant was convicted of other crimes for which consecutive sentences could have

actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.”

been imposed but for which concurrent sentences are being imposed.” In this case, the trial court chose to run the conviction on count 4 concurrent to the sentence on count 1. Thus, it properly considered that factor as a circumstance in aggravation justifying the imposition of the upper term in count 1.

Moreover, California Rules of Court, rule 4.421(b)(3) provides that one of the factors relating to the defendant which may be considered as a circumstance in aggravation is that “[t]he defendant has served a prior prison term.” Thus, the trial court also properly considered defendant’s prior prison term as a circumstances in aggravation justifying the imposition of the upper term.

Given that the trial court relied upon two independent circumstances in aggravation, in addition to the factor challenged by defendant, we cannot conclude that defendant was prejudiced, even assuming that it was improper to rely upon the challenged factor. The record supports the conclusion that the trial court was independently relying upon each of the three factors it identified for the record, two of which were proper and either of which would have justified the imposition of the upper term. Thus, it was not reasonably likely that defendant would have received a different sentence had the trial court not relied on the challenged factor in imposing the upper term sentence.

DISPOSITION

The judgment of conviction and the sentenced are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

WEISMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.